

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 13, 2004 Session

**IN THE MATTER OF: B.G.J.
(DOB: March 16, 1993)**

**Appeal from the Juvenile Court for Monroe County
No. J98-232 Edwin C. Harris, Judge**

No. E2003-02475-COA-R3-PT - FILED AUGUST 26, 2004

The trial court terminated the parental rights of R.G.J. (“Mother”), with respect to her minor child, B.G.J. (DOB: March 16, 1993), and placed custody of the child with the child’s maternal grandparents, G.M.¹ and P.M. (“the grandparents”). Mother appeals, arguing, *inter alia*, that the trial court erred in finding that Mother had committed severe child abuse, which justified the termination of her parental rights. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and H. DAVID CATE, SP. J., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the appellant, R.G.J.

John W. Cleveland, Sweetwater, Tennessee, for the appellees, G.M. and P.M.

No appearance by guardian *ad litem* for B.G.J.

OPINION

I.

On July 22, 1998, the Department of Children’s Services (“DCS”) filed a petition for temporary custody of five-year-old B.G.J. The petition avers, among other things, that the child is a dependent and neglected child and that the child has made allegations of sexual abuse against her

¹G.M. is apparently P.M.’s second husband and not the biological maternal grandfather of the child.

father, S.R.J.² When the petition was filed, the juvenile court entered an order placing temporary custody of the child with DCS. Two months later, the trial court entered a consent decree, in which the court allowed the child to reside with her grandparents as an alternative to foster care. In December, 1998, the trial court awarded the grandparents temporary custody of the child, thus relieving DCS of further responsibility for the child.

Mother filed a petition for custody of the child on October 2, 2000, alleging that the grandparents were interfering with Mother's visitation rights and requesting that the court award temporary custody of the child to Mother. The grandparents responded, stating that the child "has made allegations of sexual abuse against both her mother and her father." They denied that a change of custody was appropriate. On January 29, 2001, DCS filed a petition for a restraining order and a no contact order, stating that the child had made specific allegations of sexual abuse against Mother and that it would be in the best interest of the child for the court to restrain Mother from having any contact with the child. DCS attached to the petition copies of two forensic interviews of the child, in which the child described – in explicit detail – sexual acts performed on her by both Mother and the child's father, as well as other men who were brought into the home by Mother. Finding probable cause that Mother had sexually abused the child, the trial court entered a restraining order directing that Mother was to have no contact with the child. Following the entry of the order, Mother filed an answer to the petition, denying all allegations that she had sexually abused the child.

In April, 2002, the trial court conducted a hearing on the issue of the child's custody. Finding that the child had been sexually abused and that Mother "was a party to the abuse," the court ordered that the custody of the child would remain with the grandparents and that, pursuant to the child's wishes, no visitation would take place between Mother and the child. Mother was permitted, however, to speak with the child via telephone and to correspond with the child by mail. Following the entry of this order, Mother appealed the trial court's order to this court, following which the grandparents filed a motion to dismiss the appeal for lack of jurisdiction. That motion was granted by us on September 10, 2002. In our order of dismissal, we ruled that the appeal should have been taken to the circuit court, rather than our court.

On April 17, 2003, the grandparents filed a petition to terminate the parental rights of Mother. Among the many grounds for termination cited, the grandparents alleged the following:

[Mother] committed severe child abuse against [the child].

[Mother] has been found to have committed severe child abuse as defined in [Tenn. Code Ann.] § 37-1-102 under a prior order of this court.

[Mother] committed severe child abuse against [the child] within the meaning of [Tenn. Code Ann.] § 36-1-113(g)(4).

²The child's father, S.R.J., is not a party to this appeal.

(Numbering in original omitted). The case was heard on July 3, 2003. On September 1, 2003, the trial court entered its order, in which it found as follows:

[T]he Court finds by clear and convincing evidence that [Mother] has been guilty of sever[e] child abuse as defined in [Tenn. Code Ann. §] 37-1-102.

(Underlining in original omitted). Specifically, the trial court found that the child had been intentionally exposed to and been forced to be involved in inappropriate sexual behavior. The trial court went on to find that termination of Mother's parental rights was in the best interest of the child and that guardianship of the child should be placed with the grandparents. From this order, Mother appeals.

II.

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); **Wright v. City of Knoxville**, 898 S.W.2d 177, 181 (Tenn. 1995); **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996); **Presley v. Bennett**, 860 S.W.2d 857, 859 (Tenn. 1993).

III.

It is well-settled that "parents have a fundamental right to the care, custody, and control of their children." **In re Drinnon**, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing **Stanley v. Illinois**, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. **Santosky v. Kramer**, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." **O'Daniel v. Messier**, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

The issues raised in the pleadings, and the trial court's findings, cause us to focus on the following statutory provisions:

Tenn. Code Ann. § 37-1-147 (2001)

(a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.

* * *

Tenn. Code Ann. § 36-1-113 (Supp. 2003)

(a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.

* * *

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

* * *

(4) The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition . . . ;

* * *

Tenn. Code Ann. § 37-1-102 (Supp. 2003)

* * *

(21) "Severe child abuse" means:

* * *

(C) The commission of any act towards the child prohibited by §§ 39-13-502 – 39-13-504, 39-13-522, 39-15-302, and 39-17-1005 or the knowing failure to protect the child from the commission of any such act towards the child; . . .

* * *

Tenn. Code Ann. § 39-13-501 (2003)

* * *

(6) “Sexual contact” includes the intentional touching of the victim’s . . . intimate parts, . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification;

(7) “Sexual penetration” means . . . any . . . intrusion, however slight, of any part of a person’s body or of any object into the genital . . . openings of the victim’s, . . .

* * *

Tenn. Code Ann. § 39-13-504 (2003)

(a) Aggravated sexual battery is unlawful sexual contact with a victim by the defendant . . . accompanied by any of the following circumstances:

* * *

(4) The victim is less than thirteen (13) years of age.

* * *

Tenn. Code Ann. § 39-13-522 (2003)

(a) Rape of a child is the unlawful sexual penetration of a victim by the defendant . . . , if such victim is less than thirteen (13) years of age.

* * *

Tenn. Code Ann. § 39-15-302 (2003)

(a) A person commits incest who engages in sexual penetration as defined in § 39-13-501, with a person, knowing such person to be, . . . :

(1) The person's natural parent,

* * *

Tenn. Code Ann. § 39-17-1005 (2003)

(a) It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance or in the production of material which includes the minor engaging in:

(1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

IV.

Mother raises several issues for our consideration: (1) whether the trial court erred in failing to amend its final order from the 2002 custody proceeding; (2) whether Mother's due process rights were violated because the grandparents failed to specify in their petition to terminate upon which of three grounds of severe child abuse they were relying; (3) whether the trial court erred, in the termination hearing, in finding that the parties had stipulated to the admission into evidence of the transcript of the custody hearing, or, in the alternative, if Mother did stipulate to the admission of the transcript, whether their admission into evidence violated her due process rights; (4) whether the evidence preponderates against the trial court's finding that there is clear and convincing evidence that Mother had committed severe child abuse; and (5) whether the trial court erred in failing to specify why termination would be in the best interest of the child.

A.

Mother contends that the trial court erred in failing to grant her motion to amend the final order from the earlier 2002 custody proceeding. We disagree.

The original custody hearing was in April, 2002. On July 8, 2002, the trial court entered its order, denying Mother's petition to change custody. That order was subsequently appealed by Mother to this court, and the appeal was subsequently dismissed on September 10, 2002, for lack of jurisdiction. On May 23, 2003 – more than eight months after her appeal was dismissed by this

court, and more than ten months after the trial court issued its final order, Mother filed a motion to alter or amend the trial court's judgment, claiming that the judgment "does not fully and accurately set forth the ruling of the Court." Specifically, Mother wanted the final judgment amended to include a portion of the transcript from the custody hearing, in which the trial court discussed the issues of Mother's visitation and contact with the child. The trial court refused to amend its July 8, 2002, order, and Mother argues that this failure was error.

Tenn. R. Civ. P. 59.04 plainly states that any motion to alter or amend a judgment must be "filed and served within thirty (30) days after the entry of the judgment." Clearly, Mother failed to file her motion within this time period. Since Mother's Rule 59.04 motion was not timely filed, the trial court did not err when it refused to grant it.

B.

Mother next contends that her due process rights were violated in that, according to her, she was not put on notice as to which of the "three" grounds of severe child abuse found at Tenn. Code Ann. § 37-1-102(21) the grandparents were claiming she had violated.

Tenn. Code Ann. § 37-1-102(21) offers not three, but four definitions of severe child abuse. The first relates to physical abuse, the second involves mental and emotional abuse, the third centers on sexual abuse, and the fourth relates to the presence of a child in a place where methamphetamine is being created. Mother claims that the grandparents' failure to specify which definition of severe child abuse they were relying upon in their petition prevented Mother from having proper notice and the ability to defend against the claim, thus violating her due process rights.

We begin by noting that Mother cites to no authority to support her position that the failure to specify a type of severe child abuse constitutes a violation of her due process rights. Indeed, Tenn. Code Ann. § 36-1-113(d)(2), which sets forth the required contents of the petition, simply states – in subsection (D) – that the petition shall contain "[a]ny other facts which allege the basis for termination of parental rights and which bring the child and parties within the jurisdiction of the court." Subsection (g), which lists the grounds for termination, states as follows:

(4) The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights . . . to have committed severe child abuse against the child who is the subject of the petition

Thus, simply alleging, in a petition to terminate, that a parent has committed severe child abuse is enough to put that parent on notice of the allegations, and such notice does not constitute a violation of due process.

In the grandparents' petition to terminate Mother's parental rights, they cite at least five separate grounds which, if proven, would justify termination. With respect to the claim of severe child abuse, the grandparents stated that Mother "has been found to have committed severe child abuse as defined in [Tenn. Code Ann.] § 37-1-102 under a prior order of this court." In addition, they contended that Mother "committed severe child abuse against [the child] within the meaning of [Tenn. Code Ann.] § 36-1-113(g)(4)." Clearly, the grandparents tracked the exact language of § 36-1-113(g)(4), which was sufficient notice to Mother of the claim of severe child abuse. Furthermore, Mother was aware that the trial court, in its custody order, found that the child had been sexually abused and that Mother "was a party to the abuse." The trial court mentioned nothing else that factored into its decision in denying Mother's motion for a change of custody; there was certainly no mention of physical abuse, mental or emotional abuse, or methamphetamine exposure. It therefore seems preposterous to us that Mother can claim she was unaware of which type of severe child abuse the grandparents were referring to in their petition. This argument is without merit.

C.

Mother argues that the trial court erred in finding that she had agreed to a stipulation reciting that testimony from the prior custody hearing – in which Mother was a party – would be received by the trial court in the instant case as fully as if the witnesses testified in person. In the alternative, Mother contends that if she did so stipulate, the stipulation infringed upon her constitutional due process rights. We find both of these issues adverse to Mother.

At the beginning of the termination hearing, counsel for both parties addressed preliminary matters with the court, including the introduction of exhibits into evidence. With respect to the transcripts from the custody hearing, Mr. Cleveland, counsel for the grandparents, addressed the court as follows:

MR. CLEVELAND: And Your Honor, if I may, please, the last time we were here, I don't know if we were on record at the time, but counsel announced at that time that *we had stipulated that the original transcript of the [custody proceeding] be made an exhibit as – and be received and considered by the Court as if those witnesses were here today testifying.* And, of course, I suspect some of them might testify again, but this is primarily just to make sure that the record is clear because, of course, Your Honor heard that proceeding and you know what's in the transcript. We'd ask that –

THE COURT: I don't remember everything that's in it.

MR. CLEVELAND: I understand. I assume that adversary counsel will point out anything that's in it that he thinks he would like for you to consider. I'd ask that that be made the first exhibit.

(Emphasis added). At that point, the transcript of the custody hearing was admitted into evidence as Exhibit 1. Not only did Mother's counsel not object to the admission of the transcripts, he made no comment whatsoever. Because Mother's counsel stood mute when Mr. Cleveland announced the stipulation to the court, Mother cannot now be heard to claim that she did not so stipulate. It is well-established that a party will not be permitted to take a position on appeal that is contrary to a position it took at trial. *Clement v. Nichols*, 209 S.W.2d 23, 24 (1948); *Estate of Schultz v. Munford, Inc.*, 650 S.W.2d 37, 40 (Tenn. Ct. App. 1982).

With respect to Mother's claim that the stipulation violated her right to due process, there is no indication anywhere in the record before us that Mother raised this constitutional issue at trial. The law in this state is clear that issues not raised at trial may not be raised for the first time on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). This issue is found adverse to Mother.

D.

Next, Mother contends that the evidence preponderates against the trial court's determination – by clear and convincing evidence – that Mother committed severe child abuse, as that concept is defined in Tenn. Code Ann. § 37-1-102(21). We disagree.

As we have previously found, the specific type of severe child abuse involved in the instant case is that of sexual abuse, as defined in Tenn. Code Ann. § 37-1-102(21)(C). That subsection defines severe child abuse as including aggravated rape (§ 39-13-502); rape (§ 39-13-503); aggravated sexual battery (§ 39-13-504); rape of a child (§ 39-13-522); incest (§ 39-15-302); and especially aggravated sexual exploitation of a minor (§ 39-17-1005). Our review of the record reveals evidence of Mother committing four of these unlawful acts against the child: aggravated sexual battery, rape of a child, incest, and especially aggravated sexual exploitation of a minor. Simply put, there is overwhelming evidence in the record that Mother is guilty of severe child abuse. Accordingly, we find that the evidence does not preponderate against the trial court's finding, by clear and convincing evidence, that Mother committed severe child abuse.

As a subpart to this issue, Mother advances the theory that Tenn. Code Ann. § 37-1-102(21)(C) cannot form the basis for terminating her parental rights, as she has never been charged criminally with violating any of the listed criminal statutes. Mother cites no authority for this assertion, and the statute does not require a criminal charge or conviction in order to find that a party committed severe child abuse for the purpose of terminating that party's parental rights. This argument is without merit.

E.

Finally, Mother argues that the trial court erred in failing to make specific findings as to why it is in the child's best interest to terminate Mother's parental rights. Again, Mother cites no authority to support her position, and Tenn. Code Ann. § 36-1-113(c) only requires that the court

find that termination is in the best interest of the child – there is no statutory requirement that the court specify its reasons. However, we believe it is a safe assumption that the trial court based its best interest finding, in large part, on Tenn. Code Ann. § 36-1-113(i)(6), which relates to the parent having shown sexual abuse toward the child.

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, R.G.J.

CHARLES D. SUSANO, JR., JUDGE